Supreme Court, U.S.
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(2)

No. 07-448

In the Supreme Court of the United States

LARRY A. RANDLETT,

Petitioner,

v.

WARDEN OF ROSS CORRECTIONAL INSTITUTION, ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY RANDLETT
Petitioner,

v.

CASE NO. 2:05-cv-466
JUDGE FROST
MAGISTRATE JUDGE ABEL

PAT HURLEY, Warden,
Respondent.

REPORT AND RECOMMENDATION

Petitioner, a state prisoner, brings the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter is before the Court on the instant petition, respondent's return of writ, petitioner's traverse, and the exhibits of the parties.

This case involves petitioner's February 2002 convictions pursuant to his guilty plea in the Franklin County Court of Common Pleas on gross sexual imposition, sexual battery, corruption of a minor and disseminating matters harmful to a juvenile. Petitioner asserts in this federal habeas corpus petition that his sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004), that he was denied the effective assistance of appellate counsel due to his attorney's failure to raise such issue on appeal, and that he was denied due process and his right to confront witnesses when the trial court considered

victim impact statements, and statements made to the probation office and police in sentencing petitioner. For the reasons that follow, the Magistrate Judge concludes that petitioner's claims are either procedurally defaulted or without merit and **RECOMMENDS** that this action be **DISMISSED**.

I. FACTS and PROCEDURAL HISTORY

The facts and procedural are summarized by the Tenth District Court of Appeals as follows:

> Larry A. Randlett, appeals from judgments of the Franklin County Court of Common Pleas finding him guilty pursuant to defendant's guilty pleas, of multiple counts of gross sexual imposition in violation of R.C. 2907.05, corruption of a minor in violation of R.C. 2907.04, disseminating materials harmful to a juvenile in violation of R.C. 2907.31, and sexual battery in violation of R.C. 2907.03.
>
> According to the facts presented in connection with defendant's guilty pleas, the charges arose out of defendant's molestation of five teenage boys. In August 2000, defendant returned from California, where he had been living for about a year, to visit the W. family. He had befriended two teenage boys in the family, J.W. and K.W. K.W.'s friend, B.P., was with them the day of

defendant's visit; J.W. was in college.

Defendant apparently was working for a racing team at the time, so defendant and the boys went to Mid-Ohio during the day. They returned that evening to the W. residence. K.W. and B.P. were in K.W.'s room with defendant, where defendant was showing them a computer program on aviation. K.W. was called downstairs to the telephone to speak to his brother, J.W., leaving B.P. alone in the room with defendant.

A few moments later. K.W.'s mother came upstairs, opened the door, and observed defendant kissing B.P., who was at the time 14 or 15 years of age. "Defendant was on his knees next to [B.P.] who was sitting at a computer chair." (Tr. 34.) When confronted, defendant agreed he had a problem and swore it was the first time anything like that had happened; he stated he was seeking help the following week when he returned to California. The next day, K.W. and his mother met with B.P.'s mother to discuss the situation.

After B.P. talked to his mother, they went to the Hilliard Police Department, and an investigation was begun. B.P. revealed a number of instances of abuse that occurred between June and October

of the prior year (case No. 01CR-02-705; Franklin App. No. 03AP-385). B.P. stated he met defendant at baseball tryouts in middle school, where defendant would show up with vintage sports cars, a 1960's Cobra, a Mustang, and a Ferrari. When the boys came to look at the cars, defendant started passing out gifts and talking to them.

In June of that year, defendant asked the boys to come over to wash one of the cars, agreeing to give them $20. B.P. stated that when they were done washing the cars, defendant fondled B.P.'s penis; that was the beginning of the abuse. About a month later, B.P. went back to defendant's home, where defendant masturbated B.P. The activity culminated in October 1999 with defendant having oral sex with B.P. in defendant's hotel room.

The Hilliard detective also interviewed K.W. and his brother J.W. (case No. 01CR-08-4353; Franklin App. No. 03AP-387). J.W. met defendant in 1996, while he was a student at Hilliard Middle School. Defendant came to a soccer game, pulled up in a nice sports car, and started passing out gifts. Defendant would get the boys racing jackets and book bags related to his work with Team Rahal. Defendant's activity at the middle school

led to the summer of 1997, when J.W. was at defendant's house doing odd jobs for him. Defendant wanted to weigh J.W., but defendant stated he needed J.W. to be naked; J.W. complied. Defendant weighed J.W. a second time without clothes, but in the second weighing defendant measured J.W.'s penis. The activities led to defendant's masturbating J.W., to mutual masturbation, and later to forced oral sex. According to the state, both J.W. and K.W. received extravagant gifts from defendant worth thousands and thousands of dollars, plus hours of free flying lessons, trips to Malibu Go Cart Racing, dinner, and cash.

The Hilliard detective also interviewed J.W.'s younger brother, K.W. K.W. met defendant through J.W. in the fall of 1996 and developed a relationship with defendant in which defendant took him go-carting. K.W.'s activities with defendant led to defendant asking K.W. to try on a pilot's' suit; defendant told the boys he had been a pilot in the Air Force and had flown an F-16 fighter plane. As K.W. was naked, changing clothes, defendant began to hug and kiss K.W. Defendant progressed to more touching, to showing K.W. pornographic movies and to defendant's masturbating K.W. In fact, when K.W.'s family was away for work trips or conventions, K.W. would

stay with defendant, where defendant abused K.W. with mutual masturbation and forced oral sex.

According to the state, when the indictments on J.W. and K.W. were released to the press, the Hilliard detective received phone calls from additional people, the first being T.R. (case No. 02CR-03-1721; Franklin App. No. 03AP-388). A student at Hilliard Middle School, T.R. met defendant at a soccer game in the fall of 1993. At the conclusion of the game, defendant pulled his car out onto the field and popped open the trunk; he gave T.R. a ride a few practices later. The abuse with T.R. began with defendant's wanting to check T.R. for a hernia, reaching down into T.R.'s pants and fondling and masturbating T.R. The activity progressed to mutual masturbation, oral sex, and defendant's buying alcoholic beverages for T.R. Even though T.R. was under the age of 16, T.R. was allowed to drive defendant's cars whenever he chose. When T.R. was with defendant, T.R. was permitted to view pornography and drink, and defendant gave T.R. large sums of money that T.R. used to buy cocaine. By the summer of 1995, defendant took T.R. to a car show in Cincinnati, at which point he had anal sex with 15-year-old T.R. According to

T.R., defendant had anal sex with T.R. between 25 and 30 times.

Lastly, B.D. came forward (case No 02CR-03-1138; Franklin App. No. 03AP-386). B.D.'s father worked with defendant at Team Rahal, and when B.D. came to work with his father, defendant took an interest in B.D. According to B.D., the abuse began in June 1994, when he showered at defendant's apartment. Defendant walked in naked, had an erection. and attempted to kiss B.D. A short time later, B.D. was in one of defendant's cars, when defendant fondled him. The activity progressed to watching pornography in defendant's house with mutual masturbation. B.D. remembers February 7, 1996, his fourteenth birthday, because defendant engaged in fondling, masturbation, and oral sex with B.D. that day. B.D. reported that, in March 1996, defendant kissed, masturbated, and digitally penetrated him.

As a result of the investigation the Hilliard detective conducted, an indictment filed February 2, 2001, in case No. 01CR-02-705 (Franklin App. No. 03AP-385), charged defendant with ten counts, some with a specification, as follows:

Count 1: Gross Sexual Imposition
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition
Count 4: Gross Sexual Imposition
Count 5: Rape
Count 6: Rape
Count 7: Sexual Battery
Count 8: Sexual Battery
Count 9: Gross Sexual Imposition
Count 10: Gross Sexual Imposition

By indictment filed August 1, 2001, in case No. 01CR-08-4353 (Franklin App. No. 03AP-387), defendant was charged, some with a specification, as follows:

Count 1: Gross Sexual Imposition
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition
Count 4: Rape
Count 5: Corruption Of A Minor
Count 6: Rape
Count 7: Corruption Of A Minor
Count 8: Disseminating Matter Harmful To Juveniles
Count 9: Disseminating Matter Harmful To Juveniles
Count 10: Gross Sexual Imposition
Count 11: Gross Sexual Imposition
Count 12: Gross Sexual Imposition
Count 13: Gross Sexual Imposition
Count 14: Gross Sexual Imposition
Count 15: Gross Sexual Imposition
Count 16: Rape

Count 17: Gross Sexual Imposition
Count 18: Rape
Count 19: Corruption Of A Minor
Count 20: Rape
Count 21: Corruption Of A Minor
Count 22: Rape
Count 23: Corruption Of A Minor
Count 24: Rape
Count 25: Corruption Of A Minor
Count 26: Gross Sexual Imposition
Count 21: Gross Sexual Imposition
Count 28: Gross Sexual Imposition
Count 29: Gross Sexual Imposition
Count 30: Gross Sexual Imposition
Count 31: Gross Sexual Imposition
Count 32: Disseminating Matter Harmful To Juveniles
Count 33: Disseminating Matter Harmful To Juveniles
Count 34: Disseminating Matter Harmful To Juveniles
Count 35: Disseminating Matter Harmful To Juveniles
Count 36: Endangering Children

By indictment filed March 28, 2002, in case No. 02CR-03-1721 (Franklin App. No. 03AP-388), defendant was charged, some with a specification, with the following:

Count 1: Gross Sexual Imposition
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition

Count 4: Rape
Count 5: Corruption Of A Minor
Count 6: Rape
Count 7: Corruption Of A Minor
Count 8: Rape
Count 9: Corruption Of A Minor
Count 10: Rape
Count 11: Corruption Of A Minor
Count 12: Rape
Count 13: Corruption Of A Minor
Count 14: Rape
Count 15: Corruption Of A Minor
Count 16: Rape
Count 17: Corruption Of A Minor
Count 18: Rape
Count 19: Corruption Of A Minor
Count 20: Rape
Count 21: Corruption Of A Minor
Count 22: Rape
Count 23: Corruption Of A Minor
Count 24: Rape
Count 25: Corruption Of A Minor
Count 26: Rape
Count 27: Corruption Of A Minor
Count 28: Rape
Count 29: Corruption Of A Minor
Count 30: Rape
Count 31: Corruption Of A Minor
Count 32: Rape
Count 33: Corruption Of A Minor
Count 34: Rape
Count 35: Corruption Of A Minor
Count 36: Rape
Count 37: Corruption Of A Minor

Count 38: Endangering Children
Count 39: Endangering Children
Count 40: Endangering Children

Lastly, by indictment filed March 29, 2002, in case No. 02CR-03-1738 (Franklin App. No. 03AP-386), defendant was charged with the following:

Count 1: Kidnapping
Count 2: Gross Sexual Imposition
Count 3: Gross Sexual Imposition
Count 4: Kidnapping
Count 5: Gross Sexual Imposition
Count 6: Kidnapping
Count 7: Gross Sexual Imposition
Count 8: Kidnapping
Count 9: Gross Sexual Imposition
Count 10: Gross Sexual Imposition
Count 11: Disseminating Matter Harmful To Juveniles
Count 12: Kidnapping
Count 13: Gross Sexual Imposition
Count 14: Kidnapping
Count 15: Rape
Count 16: Corruption Of A Minor
Count 17: Kidnapping
Count 18: Gross Sexual Imposition
Count 19: Gross Sexual Imposition
Count 20: Felonious Sexual Penetration
Count 21: Endangering Children
Count 22: Kidnapping
Count 23: Gross Sexual Imposition
Count 24: Kidnapping

Count 25: Gross Sexual Imposition
Count 26: Gross Sexual Imposition
Count 27: Kidnapping
Count 28: Gross Sexual Imposition
Count 29: Gross Sexual Imposition

Although defendant originally entered not guilty pleas to all counts, on February 11, 2002, defendant changed his not guilty pleas to guilty pleas on some of the charges; the state nolled the remaining counts. Specifically, in case No. 01CR-02-705 (Franklin App. No. 03AP-385), defendant entered guilty pleas to the following: Counts 1 through 4 – Gross Sexual Imposition, felonies of the fourth degree, Counts 7 and 8 – Sexual Battery, felonies of the third degree, and Counts 9 and 10 – Gross Sexual Imposition, felonies of the fourth degree.

In case No. 01 CR-08-4353 (Franklin App. No. 03AP-381), defendant entered guilty pleas to the following: Counts 1 through 3 — Gross Sexual Imposition, felonies of the fourth degree, Counts 5 and 7 — Corruption of a Minor, felonies of the fourth degree, Count 8 — Disseminating Matters Harmful to Juveniles, a felony of the fifth degree, Counts 10 through 15 — Gross Sexual Imposition felonies of the third degree, Count 17 — Gross Sexual Imposition, a

felony of the third degree, Counts 19, 21, 23, and 25 — Corruption of a Minor, felonies of the fourth degree, Counts 26 through 31 — Gross Sexual Imposition, felonies of the fourth degree, Count 32 — Disseminating Materials Harmful to Juveniles, a felony of the fourth degree, and Count 34 — Disseminating Materials Harmful to Juveniles, a felony of the fifth degree.

In case No. 02CR-03-1721 (Franklin App. No. 03AP-388), defendant entered guilty pleas to the following: Counts 1, 2, and 3 — Gross Sexual Imposition, felonies of the fourth degree, Counts 5, 7, 9, 11, 13, 15, 17, and 19 — Corruption of a Minor, felonies of the third degree, all of which were to be sentenced under the law as it existed prior to Am.Sub.S.B. No.2 ("S.B.2"). In addition, defendant entered guilty pleas to Counts 21, 23, 25, 27, 28, 31, 33, 35, and 37 — nine counts of Corruption of a Minor, felonies of the fourth degree, all to be sentenced under the law as enacted through S.B. 2 and any pertinent amendments to it.

In case No. 02CR-03-1738 (Franklin App. No. 03AP-386), defendant entered guilty pleas to the following: Counts 2, 3, 5, 7, 25, and 26 — all Gross Sexual Imposition, felonies of the third degree, Counts 9, 10, 13, 18, 19, 23, 28, and 29 —

all Gross Sexual Imposition, felonies of the fourth degree, and Count 16 — Corruption of a Minor, a felony of the third degree.

The trial court requested a pre-sentence investigation and set the matter for a sentencing and sexual predator hearing, which the trial court held on March 31, 2003. By judgment entries filed April 3, 2003, the trial court sentenced defendant to a total of 20 years of imprisonment.

Exhibit K to Return of Writ. Represented by the same counsel, petitioner filed a timely appeal to the Tenth District Court of Appeals. He raised the following claims:

1. The trial court's imposition of consecutive sentences on defendant was not supported by the required findings pursuant to Revised Code 2929.14(E)(4) or the evidence and was error.

2. The trial court's imposition of sentence of more than the statutory minimum was not supported by the required findings pursuant to Revised Code 2929.14(B) or the evidence and was error.

3. The trial court erred in finding the defendant to be a sexual predator as the State did not establish by clear and convincing evidence that defendant was

likely to engage in the future in the commission of one or more sexually oriented offenses.

4. The trial court erred in filing a judgment entry in 01CR-705 that imposed a greater sentence than that pronounced at the sentencing hearing.

5. The trial court erred in filing a judgment entry in 02CR-1738 that imposed a greater sentence than that pronounced at the sentencing hearing.

6. The trial court deprived the defendant of due process when it utilized and relied on victim impact statements that were not made available to defendant or his counsel prior to or at the time of sentencing.

Exhibit I to Return of Writ. On December 18, 2003, the appellate court affirmed the judgment of the trial court, but sustained petitioner's fourth and fifth assignments of error, and modified judgment entries so that they accurately reflected the sentence imposed by the trial court. Exhibit K to Return of Writ. Still represented by counsel, petitioner filed a timely appeal to the Ohio Supreme Court. He asserted the following propositions of law:

1. In order to impose consecutive sentences, the trial court must make factual findings on the record (not simply

conclusions) in accordance with the provisions of 2929.14(E)(4) of the Ohio Revised Code.

2. The trial court's imposed imposition of sentences that are more than the statutory minimum were not supported by the required findings of fact pursuant to Revised Code Section 2929.14(B).

3. In order to be classified as a sexual predator, it must be found that by clear and convincing evidence that the perpetrator is likely to reoffend and commit future sexually oriented offenses.

4. Utilization of victim impact statements, which are confidential by nature, without prior notice to the Defendant or his counsel, that the Court has: a) received them; b) what their contents are; and c) attempt to use them to justify imposing greater sentences denies the Defendant of due process of law.

Exhibit L to Return of Writ. On May 12, 2004, the Ohio Supreme Court declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question.

On May 11, 2005, petitioner filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. He alleges that he is in the custody of

the respondent in violation of the Constitution of the United States based upon the following grounds:

> 1. The trial court's sentencing of petitioner to non-minimum and consecutive sentences, based on facts not found by a jury or admitted by him, violates petitioner's rights of due process and trial by jury contra the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.
>
> 2. Petitioner was denied his right to effective assistance of counsel in his direct appeal to the Franklin County Court of Appeals and to the Ohio Supreme Court, in violation of the Sixth and Fourteenth Amendment to the U.S. Constitution.
>
> 3. Petitioner was denied his rights of due process and confrontation when the court based its sentence on numerous out-of-court testimonial statements in violation of the Fifth, Sixth, and Fourteenth Amendment to the U.S. Constitution.

It is the position of the respondent that all of petitioner's claims are either procedurally defaulted, or barred due to petitioner's failure to fairly present his claims to the state courts.

II. EXHAUSTION: CLAIM TWO

Before a federal habeas court may grant relief, a state prisoner must exhaust his available remedies m the state courts. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). If a habeas petitioner has the right under state law to raise a claim by any available procedure, he has not exhausted that claim 25 U.S.C. §2254(b), (c). Moreover, a constitutional claim for relief must be presented to the state's highest court in order to satisfy the exhaustion requirement. *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). But where alternative state remedies are available to consider the same claim, exhaustion of one of these remedies is all that is necessary. *Keener v. Ridenour*, 594 F.2d 581, 584 (6th Cir. 1979). A habeas petitioner bears the burden of demonstrating that he has properly and fully exhausted his available state court remedies with respect to the claims be seeks to present for federal habeas review. *Prather v. Rees*, 822 F.2d 1418, 1420 n.3 (6th Cir. 1987).

Claim Two. In claim two, petitioner asserts that he was denied the effective assistance of appellate counsel because his attorney failed to raise on appeal an issue that his sentence violates *Blakely v. Washington*, *supra*, 542 U.S. at 296. This claim has never been presented to the state courts. Further, petitioner may still raise such claim in a delayed application to reopen the appeal pursuant to Ohio Appellate Rule 26(B):

> (B) Application for reopening
>
> (1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

Thus, claim two is unexhausted.

Respondent nonetheless contends that this Court should dismiss claim two as procedurally defaulted, because the claim is plainly without merit, and exhaustion of the claim by pursuit of a delayed 26(B) application would be futile. *Return of Writ*, at 15-16. However,

> [a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. §2254(b)(2). Further, where petitioner's federal constitutional claim is plainly meritless, "'and it would be a waste of time and judicial resources to require exhaustion,' nonexhaustion and procedural default should be excused." *Lyons v. Stovall*, 188 F.3d

327, 333 (6th Cir. 1999), quoting *Cain v. Redman*, 947 F.2d 817, 820 (6th Cir. 1991)(citing *Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987), and citing *Granberry v. Greer*, 481 U.S. 129, 131-32 (1987). Such are the circumstances here.

The right to counsel guaranteed by the Sixth Amendment is the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might e considered sound trial strategy." *Strickland*, 466 U.S.

at 689.

To establish prejudice, it must be shown that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.*, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, at 697. Because petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, if the Court determines that petitioner has failed to satisfy one prong, it need not consider the other. *Strickland*, 466 U.S. at 697.

The *Strickland* test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). While appellate counsel is not expected to raise every nonfrivolous issue on direct appeal, counsel is obligated to provide reasonable professional judgment in presenting the appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). In order to succeed on an ineffective assistance of appellate counsel claim, a petitioner must demonstrate that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 696; *Sims v. Livesay*, 970 F.2d 1575, 1579-81 (6th Cir. 1992). Petitioner cannot meet this standard here.

Petitioner does not allege that his sentence exceeded the prescribed statutory maximum for the offenses of conviction. Thus, it does not appear from the record that his sentence violated *Apprendi v. New Jersey, supra*, as that case had been interpreted at the

time petitioner was sentenced.

> In *Blakely*, the Supreme Court reversed a sentence imposed under the State of Washington's determinate sentencing scheme after finding the trial judge had enhanced the defendant's kidnaping sentence beyond the statutory maximum based upon his own finding, by a preponderance of the evidence, the defendant had acted with "deliberate cruelty." 124 S.Ct. at 2537-38. In doing so, the Supreme Court reiterated its previous holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000), but clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S.Ct. at 2537 (emphasis in original).

United States v. Buchen, 134 Fed.Appx. 842, unpublished, 2005 Fed.App. 0431N (6th Cir. May 23, 2005). *Blakely* was decided on June 24, 2004, long after petitioner's appeal was filed and the state appellate court affirmed petitioner's convictions, on

December 12, 2003. Petitioner cannot establish the ineffective assistance of counsel due to his attorney's failure to predict the Supreme Court's decision in *Blakely*. *See United States v. Burgess*, 142 Fed.Appx. 232, unpublished 2005 Fed.App. 0531N (6th Cir. June 22, 2005)(no ineffective assistance for failing to anticipate *Blakely* or *Booker*).

> Competence, not prescience, is what the constitution requires. *See United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005) ("[W]here developments in the law later expand a right that a defendant has waived in a plea agreement, the change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature. A valid plea agreement, after all, requires knowledge of existing rights, not clairvoyance."); *Green v. United States*, 65 F.3d 546, 551 (6th Cir.1995) (lawyers failure to predict Sixth Circuit's approach to law did not constitute ineffective assistance of counsel); *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1542(10th Cir. 1995)("Defendant faults his former counsel not for failing to find existing law, but for failing to predict future law. We agree ... that clairvoyance is not a required attribute of effective representation."); *Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir.1981) (holding that "Counsel is normally not expected to foresee future new developments in the

law").

Conley v. United States, 2005 WL 1420843 (W.D. Mich. June 15, 2005).

In view of all of the foregoing, claim two is without merit.

III. FAIR PRESENTMENT: CLAIMS ONE AND TWO

In order to exhaust available state remedies, a petitioner must first fairly present the substance of his federal habeas corpus claims to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Anderson v. Harless,* 459 U.S. 4, 6 (1982). "The state courts must be provided with a fair opportunity to apply controlling legal principles to the facts bearing on petitioner's constitutional claims." *Sampson v. Love*, 782 F.2d 53, 55 (6th Cir. 1986). Petitioner does not fairly present his claim simply because the necessary facts supporting a federal constitutional claim are self-evident *Haggins v. Warden*, 715 F.2d 1050, 1054 (6th Cir. 1983) (citing *Harless*, 459 U.S. at 6). Furthermore. "[a] petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions employing constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns." *Levine v. Torvik*, 986 F.2d 1506, 1515 (6th Cir. 1993)(citing *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987)). Courts normally require more than a single broad generalization that petitioner was denied a "fair trial" or "due process of law." *Franklin*, 811 F.2d at 326; *Petrucelli v. Coombe*, 735 F.2d 684, 688 (6th Cir.

1984). Petitioner, however, need not "cite book and verse on the federal constitution." *Picard*, 404 U.S. at 277 (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1960)). The Sixth Circuit has strictly followed the requirement that petitioner fairly presented his federal constitutional claims to the state courts as a precondition to federal habeas review, *Weaver v. Foltz*, 888 F.2d 1097, 1098 (6th Cir. 1989).

Claims One and Three. As discussed, in claim one, petitioner asserts that his sentence violates *Blakely v. Washington, supra*, 542 U.S. at 296. In claim three, petitioner asserts that he was denied his right to confront witnesses, in violation of *Crawford v. Washington*, 541 U.S. 36 (2004), because the trial court considered victim impact statements and other out-of-court statements in imposing sentence. Petitioner argued to the state courts, however, solely that the imposition of consecutive sentences was not supported by required findings under O.R.C. §2929.14, and that imposition of a sentence greater than the statutory minimum likewise violated the requirements of O.R.C. §2929.14. Petitioner also argued that he was denied due process because the trial court relied on victim impact statements (petitioner did not refer to any other out-of-court statements) without first making such statements available to the defendant so that he would have an adequate opportunity to respond. *See* Exhibit I to Return of Writ. This Court is simply not persuaded by petitioner's argument that the foregoing arguments adequately preserved for federal habeas corpus review a claim under *Blakely*. As petitioner concedes, he neither cited to the federal Constitution, federal case law, nor any state cases

employing constitutional analysis in the state courts. *See Traverse*, at 3. Further, petitioner has failed to establish cause or prejudice for his failure to fairly present his federal constitutional claim to the state courts. Additionally, as noted by the respondent, claim three, in which petitioner asserts that the trial court improperly considered victim impact statements is, in any event, procedurally defaulted.

Duty to fairly present constitutional claims to the state courts. In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required fairly to present those claims to the highest court of the state for consideration. 28 U.S.C. §2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to dismissal for failure to exhaust state remedies. *Id.; Anderson v. Harless*, 459 U.S. 4, 6 (1982)(*per curiam*); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). If, because of a procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 418, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 12, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to

observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an 'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.* This "cause and prejudice" analysis also applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1985).

Claims presented to the Ohio courts. The state appellate court explicitly reviewed petitioner's claim that the trial court improperly considered victim impact statements for plain error only due to petitioner's failure to object at sentencing:

> Defendant's sixth assignment of error asserts the trial court deprived him of due process by relying on victim impact statements that were not made available to defendant or his counsel at the sentencing hearing.

The victim impact statements were first mentioned on March 31, 2003, the day of the sentencing and sexual predator hearing. At that time, the court noted that a pre-sentence investigation had been ordered, and the court had reviewed it. The court then inquired whether counsel had had an opportunity to see and review the pre-sentence investigation. Counsel for defendant responded that "as is typically the case. I was given the opportunity to review, I was not given access to the victim/witness impact statements nor, of course, the recommendation for the Court, but as far as the guts of the report, I have seen it and have reviewed it." (Tr. 49.)

At the conclusion of the state's evidence, the state sought the admission of exhibits, including the pre-sentence investigation. Defense counsel inquired whether the investigation included the victim impact statements and the recommendations of the probation department. Although the court indicated that its version did, the state said its exhibit did not. Defense counsel responded, "'[clause I've not seen any of that stuff." (Tr. 73.) The report was then admitted into evidence without objection. The witness statements came up later, when defense counsel again indicated he

had not seen them. At the time of sentencing, the court referenced the victim impact statements. Defendant did not object to the court's relying on them as part of the sentencing procedure.

R.C. 2947.051(C) provides that "[a] victim impact statement prepared under this section shall be kept confidential and is not a public record ***. However, the court may furnish copies of the statement to both the defendant or the defendant's counsel and the prosecuting attorney." One appellate district has rejected an argument similar to defendant's contentions and has determined a defendant is not denied due process or equal protection when a court exercises its discretion to deny the defendant access to victim impact statements. *State v. Stewart*, 149 Ohio App.3d 1, 6, 2002-Ohio-4124. We, however, need not reach that issue, as defendant's failure to object to the trial court's use of victim impact statements requires a plain error review. Because this record does not demonstrate plain error, defendant's contentions are not persuasive.

Specifically, Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In *State v. Barnes*

(2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, the Ohio Supreme Court recently noted that "[b]y its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. *** Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. *** Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." (Citations omitted.) "Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court 'may' notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Id.*, quoting *State v. Long* (1978). 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

During the course of sentencing, the trial

court stated, "[s]o with all of these impacts in mind, the Court believes the sentencing – the Court considers the impacts on the victims under 2929.11 is significant." (Tr. 241.) Before so concluding, however, the trial court listed those aspects of the victim impact statements it believed to be significant and noted, "I have gone through the notes of the victim impact statements, made my own notes from them, just noticed such things, [B.P.] stating, who's now 17, 14 to 15 when these happened, nightmares, grades dropped from three point to 1.7, college plans got altered and changed, antidepressant meds, counseling for both [B.P.] and his mother, substance abuse problems." (Tr. 240.)

Similarly, as to another victim, the trial court stated "[K.W.] has the – has tried counseling and believed it was successful, had to move to father from mother, believes that all of this has been brought upon him by Defendant's conduct, feels very strongly about it. Sold prescription drugs, was expelled from school. *** [K.W.] said he's lost the ability to trust people." (Tr. 240, 241.) As to J.W., the court stated "it destroyed his family relationships. *** Those things are very deep and significant victim impacts." (Tr. 241.)

In a related vein, the trial court observed that T.R.'s relationship with defendant "*** was a life-altering relationship, dropped out of high school, actually – or got kicked out of high school as a result, turned to drugs, fear of bringing forth these events, shame of them, received incredible gifts from the Defendant as part of inducement to stay in the relationship. And as clearly stated, he will never be over it." (Tr. 240-241.) Similarly, as to B.D., the trial court stated B.D. "listed all the ways in which the Defendant induced him into the relationships. And he didn't tell his father because he was afraid that his father would go to prison for taking his vengeance out on the Defendant." *Id.*

At that point, the trial court stated "[s]o with all those impacts in mind, the Court believes the sentencing – the Court considers the impacts on the victims under 2929.11 is significant." *Id.* Because the trial court placed on the record those aspects of the victim impact statements on which it relied to impose its sentence, the court in effect advised defendant of the content of the statements, and it further gave defendant the opportunity to respond, if appropriate. As a result, defendant was not sentenced on the basis of victim impact statements whose content was unknown to him. Thus, the

> record does not reveal plain error arising from defendant's contentions that he was denied due process because he did not view the victim impact statements the trial court considered in sentencing defendant. Defendant's sixth assignment of error is overruled.

Exhibit I to Return of Writ.[1] Petitioner never argued to the state courts that the trial court had improperly considered any other evidence in imposing sentence. Further, petitioner may now no longer do so under Ohio's doctrine of res judicata. *See State v. Cole*, 2 Ohio St.3d 112 (1982); *State v. Ishmail*, 67 Ohio St.2d 16 (1981); *State v. Perry*, 10 Ohio St.2d 175 (1967). The Court therefore deems the first and second parts of the *Maupin* test to have been met. *See Gulertekin v. Timmelman-Cooper*, 340 F.3d 415, 423 (6th Cir. 2003), citing *Paproki v. Foltz*, 869 F.2d 281, 284 (6th Cir. 1989) and *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001).

The third requirement of *Maupin* is that the state procedural default is an adequate and independent ground foreclosing review of the federal constitutional claim. Ohio's contemporaneous objection rule is and adequate and independent state ground upon which to deny relief. The rule is stated in unmistakable terms, both in Ohio Criminal Rule 30(A) and in countless decisions. *See, e.g., State v. Landrum*,

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[1]Petitioner never argued to the state courts that the trial court had improperly considered any other evidence in imposing sentence.

53 Ohio St.3d 107, 111 (1990); *State v. Wade*, 53 Ohio St.2d 182, 188 (1978). The rule furthers important state interests in developing a record for appeal and, under certain circumstances, giving the trial judge an opportunity to correct an error at the earliest possible opportunity. Finally, the rule is independent of federal law. Likewise, the requirement that all claims be asserted at the first opportunity serves the state's interests in finality and in ensuring that claims are adjudicated at the earliest possible opportunity. The doctrine of res judicata is stated in unmistakable terms in numerous Ohio decisions and Ohio courts have consistently refused to review claims on the merits under that doctrine. *See State v. Cole*, *supra*; *State v. Ishmail, supra; State v. Perry, supra.*

Petitioner can still secure review of his claim on the merits if he demonstrates cause for his failure to follow the state procedural rules, as well as actual prejudice from the constitutional violation that he alleges. Petitioner has failed to demonstrate either cause for his procedural default of claim three or actual prejudice resulting from the alleged constitutional violation.

Beyond the four-part *Maupin* analysis, this Court is required to consider whether this is "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. at 491; *see also Sawyer v. Whitley*, 505 U.S. 333. After review of the record, the Court does not deem this to be such a case.

IV.

For all of the foregoing reasons, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**.

If any party objects to this *Report and Recommendation*, that party may, within ten (10) days of the date of this report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate Judge with instructions. 28 U.S.C. §636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Mark R. Abel
United States Magistrate Judge